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Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1997

STATE OF ARIZONA ex rel.
Arizona Department of Revenue,
Petitioner,
v.

BLAZE CONSTRUCTION COMPANY, INC.,
Respondent.

On Petition For Writ Of Certiorari
To The Arizona Court Of Appeals, Division One

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTION PRESENTED

Is a state tax on a contractor doing business with the United States on an Indian reservation pre-empted when Congress has not expressly provided for such pre-emption and there is no infringement on tribal sovereignty because no tribal funds are used and no tribe is a party to the contract?

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PETITION FOR WRIT OF CERTIORARI

The State of Arizona ex rel. Arizona Department of Revenue ("State") respectfully petitions for a writ of certiorari to review the judgment that the Arizona Court of Appeals, Division One, entered in this case on April 29, 1997.

 OPINIONS BELOW

The opinion of the Arizona Court of Appeals is reported at 947 P.2d 836 (Ariz. App. 1997). Appendix ("App.") 1. The Arizona Supreme Court's order denying review, with one justice voting to grant review, is unreported. App. 27. The Arizona Tax Court's judgment and minute entry order are unreported. App. 28-29.

 STATEMENT OF JURISDICTION

On April 29, 1997, the Arizona Court of Appeals, Division One, entered the judgment from which review is sought. On December 16, 1997, the Arizona Supreme Court denied the petition for review. App. 27. This Court has jurisdiction under 28 U.S.C. § 1257.

 STATUTORY AND REGULATORY PROVISIONS

The Appendix contains pertinent portions of the Arizona Transaction Privilege Tax, Ariz. Rev. Stat. §§ 42-1306, 42-1310.16 (App. 30); the Buy Indian Act, 25

U.S.C. § 47 (App. 33); the Federal Lands Highway Program, 23 U.S.C. § 204 (App. 34); and relevant portions of regulations of the Department of the Interior's Bureau of Indian Affairs governing road construction, 25 C.F.R. §§ 170.1-170.19 (App. 37), and self-determination contracts, 25 C.F.R. §§ 271.1-271.5 (App. 39).

STATEMENT OF THE CASE

While purporting to follow federal law, the court of appeals' opinion actually disregards that law by reading into this Court's decisions a requirement that a state may not tax commercial transactions occurring on Indian reservations between non-Indians unless there is a "direct connection" between state services and the taxed activity. That requirement contravenes this Court's long-standing principle that a state law will apply within an Indian reservation unless it interferes with tribal self-government or impairs a right granted or reserved by federal law, and replaces it with an unpredictable test that is completely divorced from the controlling question of whether Congress intended to pre-empt state taxation. In arriving at its far-reaching conclusions, the court of appeals acknowledged that its decision squarely conflicts with decisions of the New Mexico Supreme Court and the Ninth Circuit Court of Appeals. App. 8-9, 20-23. The decision also conflicts with this Court's decisions by, among other things, extending the cloak of tax immunity enjoyed by tribes to non-members and the federal government and ignoring the central role that tribal sovereignty plays in pre-emption analysis. The court of appeals also found congressional intent to pre-empt state

taxes in federal interests that are considerably weaker and statutes that are considerably less explicit than ones this Court has found do not establish pre-emption. Finally, the conflicting decisions place businesses that contract with the federal government on reservations throughout the country in the untenable position of guessing whether their transactions are subject to state taxation, and render their federal employer unable to eliminate their uncertainty because the lower courts are hopelessly divided. For these reasons, this Court should review the decision and remove the confusion it creates regarding this important issue of federal law.

A. Material Facts.

The State maintains a highway system across Arizona, including Indian reservations. The State built and maintains the principal highways of the reservations (App. 19), but the Bureau of Indian Affairs ("BIA") builds and maintains other roads that feed into the state's system. Once built, all BIA roads still belong to the federal government and must remain open to the public. 23 U.S.C. § 101(a); 25 C.F.R. § 170.8(a) ("Free public use is required on roads eligible for construction and maintenance with Federal funds under this part.").

Respondent, Blaze Construction Co., Inc. ("Blaze"), engaged in contracting activity within Arizona. App. 2. The BIA, an agency of the United States, awarded Blaze contracts to construct and repair roads on six Indian reservations located across Arizona. App. 3. The parties entered into the contracts pursuant to the Federal Lands Highways Program, which authorizes the Secretary of

Transportation to establish a coordinated program for highway construction on a variety of federal lands, including forest highways, public lands highways, and Indian reservation roads. 23 U.S.C. § 204. While some of Blaze's projects were in remote locations, many connected to or were near highways that the State maintains, and thus are essentially part of the same highway system.

Blaze transports equipment and personnel over hundreds of miles of State highways to get to its projects scattered throughout Arizona. App. 4. While Blaze pays vehicle fees and use fuel taxes for its off-reservation use of State highways, these fees and taxes go to road maintenance, not to the costs of general government. Ariz. Const. art. 9, § 14.

The State provides many services on reservations in addition to road maintenance. For example, it spends over \$100,000,000 each year on elementary and secondary schools that serve on-reservation Indians. App. 19. These education services benefit Blaze and its tribal-member employees, as do other on-reservation services that the State provides, such as law enforcement, social services, and child support enforcement. Indeed, the court of appeals recognized that the State furnishes substantial services to Blaze and tribal members. *Id.*

B. Proceedings Below.

The State initiated an action in the Arizona Tax Court to enforce a transaction privilege tax assessment against Blaze. The Tax Court entered judgment for the State, holding that federal law does not pre-empt a state tax on a contractor doing business with the federal government

on an Indian reservation. App. 28. The Arizona Court of Appeals reversed, holding that a state tax on construction contracts with a federal agency for work done on an Indian reservation must be analyzed using the implied pre-emption principles that this Court has applied to the activities of non-Indians on reservations. App. 5-9. In doing so, the court of appeals rejected the State's argument that state taxation of the federal contracts here should be analyzed under the principles that generally apply to the taxation of federal contractors – namely, that a state tax will be pre-empted only if it is imposed directly on the federal government or if a federal statute expressly preempts it. *See United States v. New Mexico*, 455 U.S. 720 (1982). The court of appeals also rejected the New Mexico Supreme Court's reasoning in an identical case that involved the same taxpayer, *Blaze Construction Co. v. Taxation & Revenue Department*, 884 P.2d 803 (N.M. 1994), *cert. denied*, 514 U.S. 1016 (1995), which held that a clear expression of congressional intent to pre-empt a state's tax is required when the federal government is a party to the tax contract.

In applying the implied pre-emption test, the court of appeals found congressional intent to preempt the State tax in the Buy Indian Act (25 U.S.C. § 47), which establishes a contracting preference for any Indian (Blaze is owned by a member of an Indian tribe located outside Arizona¹) (App. 13, 15-16), and in BIA regulations

¹ Blaze's ownership by an Indian is not decisive here because this Court has held that a non-member Indian stands on the same footing as a non-Indian for state tax purposes. *See Washington v. Confederated Tribes of the Colville Indian Reservation*,

concerning construction of reservation roads and implementation of the Indian Self-Determination and Education Assistance Act (25 C.F.R. §§ 271.1-271.5) (App. 12-13, 15-16). The court of appeals found that these federal policies were similar to those found preemptive in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832 (1982), yet failed to recognize that in *Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163 (1989), this Court upheld a state tax in the face of considerably stronger federal interests and more comprehensive statutes.

The court of appeals attempted to distinguish *Cotton Petroleum*, in which this Court upheld a state tax on a non-Indian lessee's oil and gas production, by holding that a state can only tax non-Indian activities on a reservation when there is a direct connection between the taxed activity and state services or regulation. The lower court used this holding to distinguish the numerous Arizona and federal cases that had specifically upheld taxes on non-tribal members or on transactions that did not involve tribes or tribal members.

The State filed a petition for review with the Arizona Supreme Court. The court denied the petition on

447 U.S. 134, 160-1 (1980); see also *Duro v. Reina*, 495 U.S. 676, 686 (1990) ("Exemption from state taxation for residents of a reservation, for example, is determined by tribal membership, not by reference to Indians as a general class.").

December 16, 1997, with Justice Martone voting to grant review. App. 27.

REASONS TO GRANT THE PETITION

The court of appeals' opinion interjects new confusion into the already murky area of state taxation on Indian reservations. Other courts have correctly applied this Court's decisions by focusing on the identities of the parties engaged in commercial transactions on Indian reservations, recognizing that Congress and this Court have acted to protect tribes and tribal members from the reach of state taxes, but have not acted to similarly protect non-tribal members. By relying on amorphous federal interests expressed in statutes and regulations unrelated to issues of state jurisdiction, the court of appeals' opinion undermines this Court's attempts to provide doctrinal clarity to this area. This Court should grant review and clarify that federal law does not prohibit State taxes on commercial transactions between non-tribal members.

1. The Arizona Opinion Directly Conflicts with a New Mexico Supreme Court Decision as to an Issue of Federal Law.

The Arizona Court of Appeals and the New Mexico Supreme Court have reached opposite conclusions in cases involving the same federal contractor, Blaze, on the same issue of federal law. *Blaze Construction Co. v. Taxation & Revenue Dep't*, 884 P.2d 803 (N.M. 1994), cert. denied, 514 U.S. 1016 (1995). The Arizona Court of Appeals

acknowledged this conflict and expressly disagreed with the New Mexico Supreme Court. App. 8-9, 21-23. Under these conflicting decisions, a tax on a contractor building a road for the BIA on the Navajo Reservation that begins in New Mexico and extends into Arizona would be preempted in Arizona but not in New Mexico, because the courts of these two adjoining states have issued diametrically opposed interpretations of federal law. This issue will arise in all states that contain Indian reservations, and federal contractors will have no way of knowing in advance whether they are subject to state taxation. See also *Matter of State Motor Fuel Tax Liab.*, 273 N.W.2d 737 (S.D. 1978) (federal law does not pre-empt a state fuel tax imposed on BIA road contractor). This Court alone can eliminate the confusion by speaking with authority on this important issue of federal law.² This Court should grant the petition to resolve the direct conflict between the courts of Arizona and New Mexico.

2. The Arizona Opinion Conflicts with Ninth Circuit Court of Appeals Decisions as to an Issue of Federal Law.

The court of appeals' holding that a state tax on reservation transactions that do not involve any tribe or

² The issue continues to generate litigation in New Mexico, in part because the Arizona decision gives federal contractors hope that the New Mexico decision may be overturned. See *Centex Bateson Constr. Co. v. Department of Taxation & Revenue*, Docket No. 97-99, cert. denied, 118 S. Ct. 167 (1997) (taxpayer cited Arizona opinion in challenging New Mexico court rulings upholding a tax on a contractor building a hospital on an Indian reservation for the United States Department of Health and Human Services).

tribal member is permissible only if there is a "direct connection" between state services and the taxed activity also conflicts with the reasoning of recent decisions of the Ninth Circuit Court of Appeals. See *Gila River Indian Community v. Waddell*, 91 F.3d 1232, 1239 (9th Cir. 1996) ("The Tribe's insistence that there be a direct connection between the state sales tax revenues and the services provided to the Tribe is similarly meritless."). In *Gila River*, the Ninth Circuit upheld a state tax on the sale of entertainment services by non-Indians to non-Indian customers. While state services such as law enforcement and traffic control facilitated the taxed activities, there was no "direct connection" between the tax and the services. See also *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), cert. denied, 118 S. Ct. 853 (1998) (citing *Gila River* to reject proposition that a tax on transactions between non-Indians must be "narrowly tailored" to services provided to the reservation). The Arizona Court of Appeals attempted to distinguish *Gila River* in its opinion. App. 20-21. While the Ninth Circuit correctly held that state services are entitled to little weight in determining whether a state may impose a tax on commercial transactions involving only non-Indians, the Arizona court made the requirement of a direct connection between state services and the taxed activity the linchpin of its analysis. The reasoning of the court of appeals conflicts with decisions of the Ninth Circuit. This Court should grant the petition to resolve the conflict.

3. This Court Has Never Applied the Implied Pre-emption Doctrine to Bar State Taxation of Federal Contractors Who Happen to Do Work on Indian Reservations.

The court of appeals erred in holding that express pre-emption is not necessary to bar a state tax on federal contractors when the tax is imposed on a contractor who is doing work on an Indian reservation. In the area of taxation, federal law bars a state tax only if the tax is imposed directly on the federal government or if the language of the relevant statute expressly preempts it. *United States v. New Mexico*, 455 U.S. 720 (1982).

The court of appeals found that the implied pre-emption doctrine that applies in cases involving Indians should apply in cases involving federal contractors doing business on reservations because this Court has never stated otherwise. App. 5-9. It failed to recognize, however, that federal contracts are different from any other taxed activity, because one of the parties to the contract – the United States – can unilaterally exempt itself and its contractors from any state tax. In prior cases, this Court has extended the tax immunity that tribal members enjoy to non-members doing business on the reservation not because of any implied congressional intent to protect non-members, but because of its recognition that in certain circumstances the state tax was effectively, albeit indirectly, a tax on the tribe or tribal member. See, e.g., *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 842 (1982). This Court's early formulation of the doctrine in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), explains why the doctrine is limited to those

who are dealing with tribes. In *McClanahan*, this Court made clear that what distinguishes Indian pre-emption from general pre-emption is that "Indian sovereignty . . . provides a backdrop against which the applicable treaties and federal statutes must be read." 411 U.S. at 172.³

Moreover, the court of appeals failed to grasp what the New Mexico Supreme Court understood from this Court's decisions – namely, that the identity of the contracting parties is of central importance in any Indian law analysis. When a contract involves only the federal government and a non-member of the tribe, tribal sovereignty is not affected. Moreover, federal interests do not need the protection of the implied pre-emption doctrine because the federal government can protect itself and its contractors directly, rather than by implication. The court of appeals failed to recognize that because the Indian pre-

³ If there is no tradition of tribal sovereignty or tribal immunity from state law with regard to a particular activity, tribal interests do not bar state jurisdiction. *Cotton Petroleum*, 490 U.S. at 182 ("There is, accordingly, simply no history of tribal independence from state taxation of these lessees to form a 'backdrop' against which the 1938 Act must be read."); *Rice v. Rehner*, 463 U.S. 713, 720 (1983) ("If, however, we do not find such a tradition, . . . our pre-emption analysis may accord less weight to the 'backdrop' of tribal sovereignty."); see also *Strate v. A-1 Contractors*, 117 S. Ct. 1404, 1409 (1997), quoting *Montana v. United States*, 450 U.S. 544, 565 (1981) ("In the main, the Court explained, 'the inherent sovereign powers of an Indian tribe' – those powers a tribe enjoys apart from express provision by treaty or statute – 'do not extend to the activities of nonmembers of the tribe.'").

emption doctrine's purpose is to protect tribal sovereignty, the doctrine does not apply to situations in which sovereignty is not affected, such as when the taxed transaction is between the federal sovereign and a non-member of the tribe.⁴

If Congress wishes to pre-empt state taxes on federal contractors who do work on Indian reservations, it can easily do so.⁵ Its failure to do so leaves in place the general rule that state taxes on federal contractors are permissible unless Congress expressly pre-empts them.

4. The Arizona Opinion Conflicts with this Court's *Cotton Petroleum* Decision by Requiring a State to Show a Direct Connection Between State Services and the Activities Taxed, Even When the Activities Do Not Involve Any Tribal Members.

The essential underpinning of the court of appeals' opinion is that there must be a *direct* connection between

⁴ Indeed, this Court's precedents support a rule that state taxes on commercial transactions between non-tribal members are presumed to be valid. Such a rule would be an appropriate counterpoint to this Court's rule that in the special area of state taxation of Indian tribes and tribal members, state taxes are *per se* invalid. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n. 17 (1987); see also *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214, 2221 (1995) (categorical approach provides a reasonably bright-line standard which responds to the need for substantial certainty as to the permissible scope of state taxation authority).

⁵ See 5 U.S.C. § 8909(f) (barring any state tax, fee or other monetary payment with respect to health payments made to a carrier by the United States).

state services and the specific non-Indian activity being taxed. This requirement is simply not the law. In fact, it contravenes this Court's long-standing determination that state laws are effective on Indian reservations unless their application interferes with reservation self-government or impairs a right granted or reserved by federal law. *Rice v. Rehner*, 463 U.S. 713, 718 (1983). Thus, when this Court has considered state services in its analysis it has done so to allow a state to justify the tax even in the face of strong federal and tribal interests. See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) ("State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state can justify the assertion of state authority.").

A state does not have to justify a tax with a showing of specific state services when the tax is imposed on a non-tribal member doing business with the United States, because the tax does not interfere with federal and tribal interests. The clear weight of authority is that a state tax on non-members, or on transactions involving only non-members, is not pre-empted even if extensive federal regulation and indirect economic effects on a tribe are present.⁶

⁶ See, e.g., *Department of Taxation v. Milhelm Attea*, 114 S.Ct. 2028 (1994) (Indian trader statutes did not prevent a State from imposing burdens on sales by wholesalers to Indian retailers who in turn sold to non-Indian consumers); *Cotton Petroleum* (upholding state tax on non-Indian lessee's oil production); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (upholding State tax on non-member purchasers of tobacco products from tribal retailers); *Surplus*

In *Cotton Petroleum*, this Court upheld State severance taxes on a non-Indian lessee's on-reservation production of oil and gas in the face of tribal and federal interests significantly greater than those at stake here. 490 U.S. at 185. The court of appeals misread *Cotton Petroleum* when it distinguished the decision by discovering within it a firm requirement that a state tax is permitted only if there is a direct connection between the state services and the taxed activities. *Cotton Petroleum* specifically rejected the notion that there must be a *quid pro quo* relationship between a taxpayer and the State. *Id.* at 185 n. 15. Moreover, this Court's discussion of general services that the state provided to Cotton and the tribe shows that this Court did not limit the relevant services to those that were directly connected to the taxed activity. *Id.* at 185. Indeed, in rejecting Cotton's claim that the state tax was invalid because the amount of tax paid exceeded the value of services provided by the State, this Court held that "the relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it." *Id.* at 189. Therefore, a direct connection with the taxed activity is simply not required.

While state services have been discussed as one of many factors involved in considering the tribal, federal,

Trading Co. v. Cook, 281 U.S. 647, 651 (1930) ("[R]eservations are part of the state within which they lie, and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards."); *Thomas v. Gay*, 169 U.S. 264 (1898) (territorial legislature may tax non-Indian owned cattle on Indian reservation).

and state interests at stake, whether state services are provided has only been important when the state tax is imposed on a tribe or tribal member, or on someone with whom they do business. This Court demonstrated this in its discussion of the *Ramah* and *Bracker* cases in *Cotton Petroleum*. The Court did not discuss state services in the context of analyzing congressional intent as reflected in the relevant federal laws, but only discussed them as a counterweight to the recognition that the taxes imposed in *Ramah* and *Bracker* were actually burdens on the tribes. *Id.* at 184-85. In both cases, the taxes were imposed on tribal contractors, and the taxes were passed on to the tribes. Where no tribe is a party to a transaction, the existence of state services is a factor of little import and is easily outweighed by the state's sovereign interest in exercising jurisdiction over non-tribal members within the state.

Cotton Petroleum illustrates that comprehensive federal regulation of a reservation activity, federal policy encouraging reservation economic development, and financial effects on the federal government or a tribe are not enough to pre-empt a tax on non-tribal members doing business on an Indian reservation. Moreover, this Court's analysis of congressional intent in *Cotton Petroleum* shows why the court of appeals was wrong in basing its finding of federal pre-emption on the Buy Indian Act and regulations implementing the Indian Self-Determination Act. These provisions regulate the operation of the federal government in contracting with tribes and others, but they in no way, either expressly or by plain implication, demonstrate "that Congress intended to remove all barriers to profit maximization." *Id.* at 180.

Given Congress' general acquiescence in the state taxation of federal contractors, congressional intent to establish a different rule for contractors on Indian reservations should not be implied from such amorphous expressions of congressional intent.

Because it relies on undefined congressional policies expressed in vague statutes unconnected to issues of state sovereignty and jurisdiction, the court of appeals' opinion provides little guidance to federal contractors, federal agencies, or the states as to whether federal law preempts state taxes on specific transactions. The court of appeals' opinion creates confusion by ignoring the central question – whether tribal sovereignty is affected because the state tax burdens a tribe or tribal member. It replaces the analysis grounded in this inquiry with an unpredictable structure unrelated to congressional intent. While this Court has required some balancing of tribal, federal and state interests, it has never applied the test that the court of appeals devised, which ultimately looks not at tribal sovereignty, but at whether the court thinks the tribes and the federal government might be better off if there were no state tax. *Cotton Petroleum* makes it clear that this is not the law, and that a state's sovereign interest in exercising jurisdiction throughout its territory will not be set aside based on such vague and undefined federal interests.

The general rule that federal contractors are taxable by the state should be recognized throughout the nation, unless Congress provides otherwise "either expressly or by plain implication." *Cotton Petroleum*, 490 U.S. at 175-6, 189 ("Unless and until Congress provides otherwise, each of the other two sovereigns has taxing jurisdiction over

all of Cotton's leases."). Congress has not done so here, a controlling fact ignored by the court of appeals.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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March 16, 1998

APPENDIX A
IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, ex)	
rel., ARIZONA)	1 CA-TX 96-0010
DEPARTMENT OF)	DEPARTMENT T
REVENUE,)	
Plaintiff-Appellee,)	OPINION
v.)	(Filed: Apr. 29, 1997)
BLAZE CONSTRUCTION)	
COMPANY, INC.,)	
Defendant-Appellant.)	
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Appeal from the Arizona Tax Court
Cause No. TX 94-00549

The Honorable William J. Schafer, III, Judge
REVERSED AND REMANDED

Grant Woods, The Attorney General
by Patrick Irvine, Assistant Attorney General
Attorneys for Appellee Phoenix

Margrave, Celmins & Verburg
by Gary Verburg
Attorneys for Appellant Phoenix

EHRlich, Judge

The Arizona Department of Revenue ("ADOR") assessed delinquent Arizona transaction privilege (contracting) taxes against taxpayer Blaze Construction Company. The taxes were computed on Blaze's gross proceeds from building roads for the United States Bureau of Indian Affairs ("BIA") on Indian reservations within Arizona. Blaze protested the assessment, arguing that federal law pre-empted application of the contracting tax. It prevailed in the administrative process.

ADOR then brought an action in the tax court, seeking to reinstate the assessment. On cross-motions for summary judgment, ADOR prevailed and Blaze appealed to this court, presenting the following issues:

1. Whether Blaze's pre-emption claim necessarily fails given the absence of any federal statute that expressly pre-empted the imposition of state transaction privilege taxes on the gross proceeds from work performed for BIA;
2. Whether the tax court erred in holding that federal law did not impliedly pre-empt the imposition of the tax; and
3. Whether the tax court erred in denying Blaze's claim for credit against the assessment in the amount of Arizona contracting taxes paid by its subcontractors and suppliers.

FACTS AND PROCEDURAL HISTORY

Blaze was incorporated under the laws of the Blackfoot Tribe of Oregon. *Blaze Construction Co. v. Taxation and Revenue Dep't of New Mexico*, 884 P.2d 803, 804 (N.M. 1994), cert. denied ___ U.S. ___, 115 S.Ct. 1359 (1995). During the audit period of June 1, 1986, through August

31, 1990, under contracts with the BIA, it provided road-paving, grading, drainage, overlayment, marking and bridge-building services at locations on six Indian reservations within Arizona, those of the Navajo, Hopi, Fort Apache, Colorado River, Tohono O'Odham and San Carlos Apache Indian Tribes. These reservation roads provided access to Indian villages, Indian residences, tribal governmental buildings and other locations used by tribal members.

Each of the road-improvement projects that Blaze undertook for the BIA was funded with Federal Highway Administration ("FHA") funds. The authorization for the funding was the Federal Lands Highway Program, 23 U.S.C. 204 (1994). That statute authorizes the United States Government to establish a coordinated program for highways on federal lands, including forest highways, public-lands highways, park roads, parkways and Indian reservation roads.

Annually, the BIA's Branch of Roads is told approximately what it will receive under the program for road construction. Over the period from 1989 to 1992, the annual figure was approximately \$18 million for the Navajo area. The Navajo Nation has a roads committee that establishes priorities for roads and road-improvement projects. Using the Nation's priority list, the Branch of Roads decides the scope of each project and the amounts of money to be allocated to each. Similar procedures are presumably followed in the other areas involved in this case.

The Branch of Roads issues a specification package for each project. Based on the package, the BIA's Design

Section advertises for bids. The section maintains daily contact with the FHA concerning funding for the project. Once the FHA authorizes a particular sum for the project, the BIA awards the contract.

Several of Blaze's contracts with the BIA provided for pre-construction meetings at the BIA's Phoenix office. Blaze used state roads to transport equipment from reservation to reservation in performing its BIA contracts. It paid Arizona motor vehicle registration fees, motor carrier taxes and use fuel taxes.

The State of Arizona did not participate in planning or developing any of Blaze's projects on reservations in Arizona. It issued no permits. It provided no inspection services related to employment, construction, quality or safety. It provided no maintenance or regular law-enforcement services on any of the reservation roads on which Blaze worked. The tribes provided all of the employment-referral services for each project. Some 85% of the workers whom Blaze employed on the projects are Indians.

State highway services are funded by appropriations from the Arizona Highway User Revenue Fund, the source for which is Arizona fuel taxes. Ariz. Rev. Stat. Ann. ("A.R.S.") §§ 28-1502, 28-1557. The state also receives funds through three federal programs for highway resurfacing, rehabilitation and restoration. It receives no more or less of these funds because the roads to which they pertain pass through Indian reservations. None of the portions of reservation roads on which Blaze worked under contracts with the BIA was among those for which

the state was responsible to maintain, repair, resurface, rehabilitate or restore.

On May 21, 1993, ADOR issued a revised assessment of contracting privilege taxes against Blaze for the audit period June 1, 1986, through August 31, 1990. ADOR's hearing officer and, later, its director, rejected Blaze's protest on the merits. On administrative appeal, the Board of Tax Appeals vacated the assessment, holding that federal law pre-empted application of the contracting privilege tax to Blaze's BIA contract payments.

ADOR brought a refund action in the tax court pursuant to A.R.S. § 42-124(B) (Supp. 1996). The court held for ADOR, finding dispositive the decision in *Department of Revenue v. Hane Construction Co.*, 115 Ariz. 243, 564 P.2d 932 (App. 1977), and Blaze appealed.

DISCUSSION

A. Applicability of Indian Law Pre-emption Analysis

Blaze contends that this case is governed by the implied preemption analysis that the United States Supreme Court has repeatedly applied to assertions of state authority over the activities of non-Indians on Indian reservations. It argues that this Indian law pre-emption analysis precludes the state from imposing contracting privilege taxes on the proceeds from Blaze's BIA contracts.

ADOR's initial response is that Indian law pre-emption analysis does not apply here at all. It argues that, because Blaze's contracts were with the BIA and not the affected tribes, a more general rule applies: State taxes

will be deemed pre-empted only if they are imposed directly on the federal government or if a federal statute expressly preempts them. See *United States v. New Mexico*, 455 U.S. 720 (1982). Relying on the decision of the New Mexico Supreme Court in *Blaze Construction*, 884 P.2d 803, ADOR claims that Indian law pre-emption analysis applies only when a state attempts to assert authority over the reservation activities of non-Indians who engage directly in commerce with reservation Indians.

The Supreme Court articulated the modern formulation of Indian law pre-emption analysis in *White Mountain Apache Tribe v. Bracker*:

When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. [Citations omitted.] *More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation.* In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. *This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.*

448 U.S. 136, 144-45 (1980) (emphasis added).

This formulation neither suggests nor implies that Indian law pre-emption analysis is inapplicable when the on-reservation activities of non-Indians over which the state seeks to exercise authority do not arise out of direct commercial relations with the tribe or a tribal entity. Moreover, nothing in the Court's application of that analysis in *White Mountain* suggests that it implicitly follows any such limitation. The identity of the nominal contracting party in fact played no part in the inquiry. The Court stated, for example:

... Respondents [including the State of Arizona] seek to apply their motor vehicle license and use fuel taxes on Pinetop [the taxpayer] for operations that are conducted solely on Bureau [of Indian Affairs] and tribal roads within the reservation. There is no room for these taxes in the comprehensive federal regulatory scheme. In a variety of ways, the assessment of state taxes would obstruct federal policies. And equally important, *respondents have been unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation.*

* * *

Respondents' argument is reduced to a claim that they may assess taxes on non-Indians engaged in commerce on the reservation whenever there is no express congressional statement to the contrary. That is simply not the law. In a number of cases we have held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject. *The*

Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.

Id. at 148-49, 150-51 (emphasis added; citations and footnote omitted). The Court's sole reference to a supposed dichotomy between the BIA and the tribe indeed runs contrary to ADOR's contention here. In a footnote to the first sentence of the passage quoted immediately above, the Court stated:

In oral argument counsel for respondents appeared to concede that the asserted state taxes could not lawfully be applied to tribal roads and was unwilling to defend the contrary conclusion of the court below, which made no distinction between Bureau and tribal roads under state and federal law. . . . For purposes of federal pre-emption, however, we see no basis, and respondents point to none, for distinguishing between roads maintained by the Tribe and roads maintained by the Bureau of Indian Affairs.

Id. at 148 n.14.

Moreover, neither ADOR nor the New Mexico court's opinion in *Blaze Construction* attempts to identify reasoning in any of the Court's other decisions which would support an exception to Indian law pre-emption analysis founded on the absence of direct commercial relations between the taxpayer and the tribe. Both the New Mexico court and ADOR rely principally on the facts from which

those decisions happened to arise and not on their reasoning.

The New Mexico court in *Blaze Construction* further relies on the view that equating Indian tribes and the BIA improperly ignores tribal sovereignty. In our opinion, this view does not pertain analytically to the pre-emption question. It overlooks the focus of Indian law pre-emption analysis on the occurrence of non-Indian activities on an Indian reservation and the consequent potential that state taxation of those activities will conflict with federal or tribal interests reflected in federal law.

Even less to the point, ADOR argues that "[s]tate jurisdiction over tribes and tribal members can endanger the very existence of tribes, and courts will act to implement federal policy promoting the existence of tribes." ADOR forgets that the branch of Indian law pre-emption analysis that we consider here concerns assertions of state authority exclusively over non-Indians, not Indian tribes or their members.

In short, *Blaze's* challenge to the imposition of Arizona's transaction privilege tax on the gross proceeds from its contracts with the BIA can be resolved only by reference to Indian law pre-emption analysis as developed by the Supreme Court.

B. Application of Indian Law Pre-emption Analysis

In *Hane Construction*, the taxpayer lined canals on the Colorado River Indian Reservation in accord with a contract with the BIA. 115 Ariz. at 244, 564 P.2d at 933. ADOR assessed contracting taxes against its gross proceeds from

the job. *Id.* On ADOR's appeal from summary judgment for the taxpayer, this court reversed, holding that a balancing of the rights of the federal government, the state and the reservation Indians revealed no implied federal pre-emption of the Arizona contracting tax as applied. *Id.* at 244-246, 564 P.2d at 933-935. In the instant case, the tax court found the decision in *Hane Construction* controlling.

Blaze assails the tax court's ruling on several grounds. It contends that *Hane Construction*, which predated *White Mountain*, necessarily failed to take into account the Indian law pre-emption analysis the Supreme Court adopted in that case and applied in those that followed it. According to Blaze, only the more recent Supreme Court cases have made clear that a state's assertion of authority over non-Indians on a reservation may be pre-empted despite the absence of an express federal pre-emption provision. Further, argues Blaze, it is only of recent origin that a state must justify burdening federal and tribal interests by showing that it performs an on-reservation regulatory function in connection with the specific activity it attempts to tax. Finally, Blaze contends that, in contrast to the taxpayer in *Hane Construction*, it has identified a specific federal regulatory scheme that Arizona's contracting tax impedes and specific tribal interests that the tax burdens.

Preliminarily, *Hane Construction*, which was decided on facts and issues identical to those in this case, had never been disapproved and, therefore, it was binding on the tax court. That court correctly left to the appellate courts the question whether *Hane Construction* remained good law in light of more recent cases.

Unlike the tax court, this court is free to reexamine *Hane Construction*. Having done so, we agree with Blaze that, no matter how close in point *Hane Construction* may appear to be to this case, Indian law pre-emption analysis has evolved through too many intervening Supreme Court decisions, and the surrounding legal environment has undergone too many intervening changes, for our resolution of this appeal to rest on *Hane Construction* alone. Our analysis must consider Indian law pre-emption doctrine at its current level of development. *See, e.g., Dep't of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989); *Ramah Navajo School Bd. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *White Mountain*, 448 U.S. at 136.

As we noted above, to test the validity of the state's assessment against Blaze, we must engage in "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain*, 448 U.S. at 145; *accord Milhelm Attea & Bros.*, 512 U.S. at 61; *State ex rel. Dep't of Revenue v. Dillon*, 170 Ariz. 560, 564, 826 P.2d 1186, 1189-90 (App. 1991). Restated more concretely, "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983); *accord Arizona Dep't of Revenue v. M. Greenberg Construction Co.*, 182 Ariz. 397, 401, 897 P.2d 699, 703 (App. 1995).

The first question we thus face here is whether the state's imposition of its privilege tax on Blaze's BIA contracting payments "interferes or is incompatible with" any federal or tribal interest reflected in federal law. *Mescalero*, 462 U.S. at 334. Blaze argues that imposition of the tax interferes with three distinct federal policies.

Blaze compares this case with *White Mountain* and *Ramah Navajo School Bd.* and argues that it is legally indistinguishable from either. Like the statutory provisions and regulations governing Indian-controlled, on-reservation schools in *Ramah*, Blaze contends that the BIA regulations concerning construction of reservation roads reserve to that agency complete authority over on-reservation road improvement contracting, design, project selection, maintenance, use and policing. *Ramah*, 458 U.S. 832; see generally 25 C.F.R. 170.1 through 170.9 (1996). It argues in addition that safe, passable roads are necessary to the success of the BIA's federally-mandated efforts to provide shelter, medical services, education and other social services to reservation Indians. Indeed, contends Blaze, the BIA road regulations are the same ones on which the Supreme Court in *White Mountain* held that Arizona's motor vehicle fuel and use fuel taxes were federally pre-empted. It urges that the imposition of Arizona contracting privilege taxes here is incompatible with the federal and tribal interest in channeling all available funding toward building and improving reservation roads.

Blaze further contends that imposing the Arizona contracting tax on payments under the BIA road-improvement contracts directly conflicts with the BIA's regulations under the Indian Self-Determination and

Education Assistance Act, 25 C.F.R. 271.1 through 271.5 (1996). It asserts that, under ADOR's view of this case, ADOR could not have imposed the state contracting tax on Blaze if the reservations' tribal authorities rather than the BIA had let the contracts in question. It points out that 25 C.F.R. 271.4(d) and (e) express a federal policy in favor of leaving entirely to Indian tribes, free of sanctions, the decision whether to apply for contracts with the BIA to plan, conduct or administer BIA programs. Accord 25 C.F.R. 271.1(d). Blaze argues that allowing the imposition of state privilege taxes on non-tribal members under contract with the BIA attaches an undesirable consequence to a tribe's decision not to seek to administer construction programs in the BIA's place by effectively reducing the road-improvement services that the tribes can receive in return for the available federal funding.

Blaze finally asserts, without contradiction by ADOR, that the BIA limits bidding on reservation-road programs to Indian-owned contractors and is not permitted to accord preferences based on bidders' affiliation with the tribe that controls the reservation where the work is to be done. See 25 U.S.C. 47 (1994) (the Buy Indian Act). Blaze adds that ADOR has tacitly acknowledged that an Indian contractor living and working on his home reservation could not be subjected to the state contracting privilege tax. See *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). Blaze observes that, if ADOR may thus impose the contracting tax on a non-tribal member like Blaze but not on a competing reservation Indian, then it effectively inserts into the reservation road-improvement process a tribal affiliation preference of the kind that federal policy forbids. Blaze contends that imposition of

the state contracting tax on non-tribal members who provide on-reservation services under contract with the BIA therefore conflicts with the BIA's implementation of the Buy Indian Act.

The unsuccessful taxpayer in *Hane Construction* made no such specific claims of incompatibility between the state's contracting tax and provisions of federal law.¹ To resolve these claims, we necessarily must go beyond the holding of that case.

ADOR answers Blaze's contentions by attempting to demonstrate that the applicable federal statutes neither express nor imply any congressional intent to pre-empt state taxation of federal contractors on Indian reservations. It notes that 23 U.S.C. 204, which established the Federal Lands Highway Program, from which the BIA obtains funding for reservation road-improvement projects, expresses an intent that all federal-roads and highways be treated under the same uniform policies. ADOR concludes from this expression of intent that Congress must have intended that federal contractors on Indian reservations be subject to state taxation to the same extent as all other federal contractors.

We disagree with this analysis. Because 23 U.S.C. 204 makes no mention of state taxation of federal contract

¹ In *Hane Construction*, the court stated: "Although the appellee here has suggested that there are federal regulations or other provisions of law which expressly conflict with the imposition of the transaction privilege tax in this case, it has called no such specific regulations to our attention." 115 Ariz. at 244, 564 P.2d at 933.

proceeds, it does not support the view that Congress intended it to address this state taxation topic.

ADOR denies that the BIA's reservation-road regulations amount to a comprehensive federal scheme into which state taxing authority may not intrude. The Supreme Court's opinion in *White Mountain* belies that view. There the Court held that Arizona's imposition of motor vehicle fuel and use fuel taxes on a company that engaged in logging and hauling on a reservation under contract with the tribe was pre-empted by the applicable federal regulatory scheme. 448 U.S. at 147-48. This scheme included the BIA's comprehensive regulations governing the harvesting and sale of tribal timber and the Secretary of the Interior's "detailed regulations governing the roads developed by the Bureau of Indian Affairs. 25 C.F.R. Part 162 (1979) [now 25 C.F.R. Part 170 (1995)]."

Further, ADOR does not directly respond to Blaze's analyses in support of its contention that imposing the Arizona contracting tax in this case conflicts with the Buy Indian Act and with the BIA's regulations under the Indian Self-Determination and Education Assistance Act. Indeed, ADOR does not address the Self-Determination Act at all. Concerning the Buy Indian Act, ADOR cites *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and the decision in *Dillon*, 170 Ariz. at 560, 826 P.2d at 1186, for the proposition that federal law permits states to treat non-members of the tribe occupying a reservation as non-Indians and therefore to tax them.

Again we disagree. The essence of the Buy Indian Act is to impose on the Secretary of the Interior, acting

through the BIA, the duty to employ Indian labor as far as practicable and to purchase the products of Indian industry in his discretion. 25 U.S.C. 47. The *Colville* and *Dillon* cases concerned on-reservation sales of cigarettes produced off-reservation by non-Indians. In neither case did the court consider how the Buy Indian Act might affect the legality of the state taxes challenged in those cases and ADOR does not attempt to explain how the facts of those cases, in which the BIA played no role at all, might have implicated the Buy Indian Act.

ADOR also disputes Blaze's contention that Arizona's imposition of the contracting privilege tax in this case adversely affected the reservation tribes' interests. It argues that Blaze's assertion that more miles of road would have been built were it not for the tax is speculative and unsupported by evidence. ADOR additionally cites *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996), and our decision in *M. Greenberg Construction*, 182 Ariz. 397, 897 P.2d 699, for the proposition that a state may impose a non-discriminatory tax on a non-Indian with whom the United States Government or a tribe does business, even though the economic burden of the tax may fall on the government or the tribe. ADOR argues that, "even if there was some economic harm to the tribes here, that harm without more is insufficient to defeat the tax."

Both *Gila River*, 91 F.3d at 1237, and *Greenberg*, 182 Ariz. at 404, 897 P.2d at 706, on which ADOR relies, based their analyses on language in *Cotton Petroleum*, 490 U.S. at 163. An examination of *Cotton Petroleum*, however, reveals that ADOR misplaces its reliance on *Gila River* and *Greenberg* under the circumstances before us here.

In *Cotton Petroleum*, the Court held that a New Mexico tax on on-reservation oil production was not pre-empted under Indian law pre-emption analysis. It found that the state tax was not incompatible with the applicable federal statutes, and it distinguished both *White Mountain* and *Ramah* on the basis that the federal regulatory schemes applicable in those cases were comprehensive, the economic burden of the taxes fell on the tribes and the taxing authorities had asserted no legitimate regulatory interests that might justify the challenged taxes. However, the Court noted that the state regulated the spacing and mechanical integrity of the reservation oil wells, the production from which was subjected to the challenged tax.

We thus conclude that federal law, even when given the most generous construction, does not pre-empt New Mexico's oil and gas severance taxes. *This is not a case in which the State has had nothing to do with the on-reservation activity, save tax it.* Nor is this a case in which an unusually large state tax has imposed a substantial burden on the Tribe. *It is, of course, reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate. Any impairment to the federal policy favoring the exploitation of on-reservation oil and gas resources by Indian tribes that might be caused by these effects, however, is simply too indirect and too insubstantial to support Cotton's claim of pre-emption.* To find pre-emption of state taxation in such indirect burdens on this broad congressional purpose, absent some special factor such as those present in *Bracker and Ramah Navajo School Bd.*, would be to

return to the pre-1937 doctrine of intergovernmental tax immunity. Any adverse effect on the Tribe's finances caused by the taxation of a private party contracting with the Tribe would be ground to strike the state tax. Absent more explicit guidance from Congress, we decline to return to this long-discarded and thoroughly repudiated doctrine.

490 U.S. at 186-87 (emphasis added).

In contrast to *Cotton Petroleum*, *Gila River* and *Greenberg*, this is not a case in which Arizona can correctly claim to have had anything to do with the "on-reservation activity," in this case building and improving reservation roads, other than taxing it. The BIA's road regulations, 25 C.F.R. 170.1 through 170.9, give state officials no automatic role in planning, surveying, designing, constructing, repairing, using or maintaining the BIA roads on Indian reservations. The sole reference to state participation in those processes is in 25 C.F.R. 170.7 (1995), which allows the BIA to solicit agreements for the states' voluntary cooperation in building and maintaining certain roads and bridges, "especially at those locations where road projects serve non-Indian land as well as Indian land."

The record in this case reveals no such agreement with Arizona. Further, ADOR makes no claim that the state provided regulatory or other services related to improving, maintaining or using any of the reservation roads at issue here. Instead, ADOR's position is that it need not have provided services directly related to the on-reservation activity subject to taxation to establish a state interest "sufficient to justify the assertion of State

authority." *Mescalero Apache Tribe*, 462 U.S. at 334. ADOR argues that Arizona's activities in maintaining and repairing major highways that allow access to the BIA roads, its expenditure of significant sums that assist school districts in educating reservation residents² and the general governmental services it provides to blaze off the reservations, adequately established such an interest under Indian law pre-emption analysis. It relies on *Gila River*, 91 F.3d at 1232, *Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734 (9th Cir.), cert. denied ___U.S.___, 116 S.Ct. 186 (1995), and the New Mexico Court's decision in *Blaze Construction*, 884 P.2d at 803.

Salt River fails to support the proposition for which ADOR cites it. The contention that the Ninth Circuit rejected in that case was not that the state had to perform a regulatory function or service in connection with the on-reservation activity to acquire an interest sufficient to tax it. The taxpayer's contention was, instead, that the tax was invalid unless the state provided services to the reservation tribe that were "proportional" to the state taxes generated by the on-reservation activities. 50 F.3d at 737-38. Contrary to ADOR's implication, this contention presupposed nothing about the existence of a direct connection between the state's governmental services and the taxpayer's on-reservation activities. It promoted instead the view that, to collect the challenged state taxes, the state had to show that it provided the tribe with services of roughly equivalent value in return. The court

² The state additionally provides considerable funding and many services to public school districts in Arizona, including those wholly or partly on Indian reservations.

in *Salt River* correctly rejected this contention based on language in Part IV of *Cotton Petroleum*, which addressed the taxpayer's distinct argument in that case that the tax violated the Due Process and Indian Commerce Clauses of the United States Constitution. *Salt River*, 50 F.3d at 737-738.³

Later on, however, summarily and without explanation, a different panel of the Ninth Circuit drew *Salt River's* analysis of the proportionality contention into its own analysis of a distinct Indian law pre-emption issue. *Gila River*, 91 F.3d at 1232, 1239. The court in *Gila River*

³ The Court stated:

... [T]here is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer – or by those living in the community where the taxpayer is located – must equal the amount of its tax obligations.

Cotton, in effect, asks us to divest New Mexico of its normal latitude because its taxes have "some connection" to commerce with the Tribe. The connection, however, is by no means close enough. There is simply no evidence in the record that the tax has had an adverse effect on the Tribe's ability to attract oil and gas lessees. It is, of course, reasonable to infer that the existence of the state tax imposes some limit on the profitability of Indian oil and gas leases – just as it no doubt imposes a limit on the profitability of off-reservation leasing arrangements – but that is precisely the same indirect burden that we rejected as a basis for granting non-Indian contractors an immunity from state taxation. . . .

490 U.S. at 190-91 (citations omitted).

presented *Salt River's* quotation from the Indian Commerce Clause discussion in *Cotton Petroleum* as if the court in *Salt River* had invoked that language to reject a contention in the tribe's pre-emption analysis "that there be a direct connection between the state sales tax revenues and the services provided to the Tribe" *Id.* at 1239. As we observed above, however, the tribe in *Salt River* made no such contention and the court expressed no view on that point.

The New Mexico Supreme Court employed the same misinterpretation of *Cotton Petroleum* in *Blaze Construction*, 884 P.2d at 808-09. This misunderstanding formed the basis on which the court rejected the conclusion of its intermediate appellate court that New Mexico provided insufficient regulatory or other services in connection with *Blaze's* on-reservation activities in that state to justify taxing *Blaze's* proceeds.

The Court [of Appeals] first erred by holding that the state gross receipts tax was preempted because "the State has identified absolutely no interest in the [road-construction] activity." *Id.* [871 P.2d at 1371]. As part of the preemption analysis, *Bracker* and *Ramah* both held the state must identify a regulatory function or service performed that would justify the tax. *Ramah*, 458 U.S. at 843-44; *Bracker*, 448 U.S. at 150. Both cases held that the state's general interest in raising revenue through taxes was not sufficient justification for imposing the tax. *Ramah*, 458 U.S. at 845; *Bracker*, 448 U.S. at 150. However, *Cotton Petroleum* abandoned the quid pro quo theory of taxation articulated in *Bracker* and *Ramah*. In *Cotton Petroleum*, the Court rejected the corporation's argument that "tax

payments by reservation lessees far exceed[ed] the value of services provided by the State to the lessees." 490 U.S. at 189. The Court noted that "the relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it." *Id.*

* * *

Applying *Cotton Petroleum* to *Blaze* and *Arco*, we conclude that it was irrelevant that the state did not identify specific services or regulatory functions provided in exchange for taxes collected. Taxes are not imposed in exchange for services provided. Instead, taxes are a means of distributing the cost of government among the general population, including its Indian citizens. The state thus had an interest in taxing for the common good – i.e., the welfare of its entire populace, Indian and non-Indian alike. We hold that the interest in raising revenue was sufficient to justify levying the gross receipts tax on *Blaze* and *Arco*. We hold that the Court of Appeals erred by disregarding *Cotton Petroleum* and holding that state taxes must be directly linked to a state interest in the activity being taxed.

Id.

Contrary to the court's analysis in *Blaze Construction*, the Court in *Cotton Petroleum* did not equate the "quid pro quo theory" with the distinct contention that a state cannot tax on-reservation activities of non-Indians unless it provides regulatory or other services related to those activities. Compare *Cotton Petroleum* Part III, 490 U.S. at 176-87 with *Cotton Petroleum* Part IV, 490 U.S. 187-91.

More importantly and again contrary to the court's holding in *Blaze Construction*, the Court in *Cotton Petroleum* did not abandon the requirement of *White Mountain* and *Ramah* that there exist a relationship between the services the state provides and the on-reservation activities it seeks to tax. In *Cotton Petroleum*, the taxpayer argued that the state's oil and gas severance taxes interfered with applicable federal laws and policies, and that the state's responsibilities in connection with the taxpayer's on-reservation activities, in comparison to the responsibilities of the tribe, were "significantly limited." 490 U.S. at 177.

The Court found no implied intent to pre-empt state taxation of non-tribal member lessees in the applicable federal law. It further observed that, in *White Mountain*, it had held that the state had been "unable to identify any regulatory function or service (it) performed . . . that would justify the assessment of taxes for activities on [BIA] and tribal roads within the reservation." *Cotton Petroleum*, 490 U.S. at 184. The Court additionally noted that, in *Ramah*, it had concluded: "Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education – a scheme which has left the State with no duties or responsibilities." *Cotton Petroleum*, 490 U.S. at 185 (citations omitted).

The Court pointed out that, in contrast to those cases, the state provided the taxpayer and the tribe with substantial services, and "regulate[d] the spacing and mechanical integrity of wells located on the reservation." *Id.* at 185-86. It stated that the case before it was not one

"in which the State has had nothing to do with the on-reservation activity, save tax it." *Id.* at 186. The Court held that, absent this "special factor" present in both *White Mountain* and *Ramah*, the "indirect," "insubstantial" economic effect that the state tax had on the tribe would not support a finding of pre-emption. *Id.* at 187. In contrast, here the services which the state provides to Blaze and to tribal members, substantial though they may be, have no direct connection either to Blaze's on-reservation road-construction and improvement activities or to the maintenance or use of those roads after Blaze's work on them is finished.

We thus agree with Blaze that the circumstances in this case are legally indistinguishable from those in *White Mountain*. The field of on-reservation activity that the state seeks to tax is governed by comprehensive federal regulations. Indeed, the road-building and improvement regulations that apply in the instant case are among those on which the Court in *White Mountain* in part based its finding of pre-emption. As it stated:

. . . [T]his is not a case in which the State seeks to assess taxes in return for governmental functions it performs for those on whom the taxes fall. Nor have respondents been able to identify a legitimate regulatory interest served by the taxes they seek to impose. . . . [W]e are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations conducted solely on tribal and Bureau of Indian Affairs roads. . . . The roads at issue have been built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors. We do not believe that

respondents' generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme

448 U.S. at 150.

We distinguish our decision in *Pimalco v. Arizona Department of Revenue*, 233 Ariz.Adv.Rep. 28 (App. Jan. 9, 1997). In that case, we rejected the taxpayers' contention that imposition of the state's ad valorem property tax on their leasehold interests in tribal land was pre-empted by federal law. *Id.* at 32. Although the taxpayers relied on *White Mountain*, they failed to offer "the particularized examination of the relevant state, federal, and tribal interests" that the case requires. *Id.* Our opinion in *Pimalco* did not attempt to fill that void. Analogous decisions instead formed the basis for its holding that no conflict existed between the state tax and federal regulation of leaseholds in Indian trust land.

Additionally, in rejecting the taxpayers' related contention that application of the state tax interfered with tribal self-government, in *Pimalco* we referred to regulatory and other services not specific to the leasing of tribal trust land that the state provided to the taxpayers and the tribe. Unlike the situation in this case, the question whether such generalized state governmental services are material to Indian law pre-emption analysis was not raised in *Pimalco* and, therefore, the opinion in that case should not be read to address or resolve that question.

We conclude that the holding in *Hane Construction*, 115 Ariz. 243, has been superseded by governing federal

case law and is no longer authoritative. We also determine that the analysis in *Blaze Construction*, 884 P.2d 803, is unpersuasive. We hold (1) that the principles of Indian law pre-emption analysis apply in this case even though Blaze's contracts for on-reservation road improvements were let by the BIA rather than by the affected tribes and (2) that those principles require us to conclude that imposition of Arizona's contracting privilege tax on Blaze was impliedly pre-empted by federal law and therefore of no legal effect.

CONCLUSION

The judgment is reversed. This case is remanded to the tax court with directions to enter judgment for Blaze.

/s/ Susan A. Ehrlich
SUSAN A. EHRLICH, Judge

CONCURRING:

/s/ E. G. Noyes, Jr.
E. G. NOYES, Jr., Presiding Judge

/s/ Rudolph J. Gerber
RUDOLPH J. GERBER, Judge

APPENDIX B

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Phoenix, Arizona 85007-3329
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Noel K. Dessaint
Clerk of the Court

Kathleen E. Dempsey
Chief Deputy Clerk

December 19, 1997

Re: STATE OF ARIZONA ex rel. ARIZONA DEPARTMENT OF REVENUE vs. BLAZE CONSTRUCTION COMPANY, INC.

Supreme Court No. CV-97-0257-PR
Court of Appeals No. 1 CA-TX 96-0010
Arizona Tax Court No. TX 94-00549

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 16, 1997, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Martone voted to grant the petition for review.

Record returned to the Court of Appeals, Division One,
Phoenix this 19th day of December, 1997.

NOEL K. DESSAINT, Clerk

APPENDIX C

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

STATE OF ARIZONA, ex)	
rel., ARIZONA)	No. TX 94-00549
DEPARTMENT OF)	JUDGMENT
REVENUE,)	
Plaintiff,)	(Hon. William J. Schafer III)
vs.)	
BLAZE CONSTRUCTION)	
COMPANY, INC.,)	
Defendant.)	
_____)	

The above entitled and numbered cause having come before the Tax Court on cross-motions for summary judgment, and argument having been heard,

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the Department of Revenue's Motion for Summary Judgment is granted, Blaze Construction's motion for summary judgment is denied, and that judgment be entered for the Plaintiff against the Defendant.

Dated this 7 day of March, 1996.

William J. Schafer, III
Judge, Arizona Tax Court

APPENDIX D

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

HON. WILLIAM J. SCHAFFER, III

November 28, 1995

J. Auchinleck
Deputy

No. TX 94-00549

STATE OF ARIZONA, ex	Attorney General
rel., ARIZONA	By: Patrick Irvine
DEPARTMENT OF	
REVENUE,	

v.

BLAZE CONSTRUCTION
COMPANY, INC.,

Gary Verburg #005515

On November 27, 1995, the Court heard argument on the cross motions for summary judgment. The Court feels that the decision in *Dept. of Revenue v. Hane Construction Co., Inc.* 115 Ariz. 243, 564 P.2d 932 (Ct.App. 1977) is dispositive of the issue here. Therefore,

IT IS ORDERED granting the Department's motion for summary judgment and denying the taxpayer's cross-motion for summary judgment.

APPENDIX E
STATUTES INVOLVED

1. *The Arizona Transaction Privilege Tax, Title 42, Ch. 8, Art. 1, Arizona Revised Statutes (1991) provides in pertinent part:*

§ 42-1306. Levy of tax; purposes; distribution

A. There is levied and there shall be collected by the department, for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the municipalities and counties in this state, to reduce or eliminate the annual tax levy on property for state, municipal and county purposes and to reduce the levy on property for public school education, privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as prescribed by this article.

B. If any funds remain after the payments are made for state purposes, as provided for by subsection A, the remainder of the funds shall be paid into the state school fund for educational purposes.

C. The tax levied by and collected pursuant to this article is designated the "transaction privilege tax".

§ 42-1310.16. Prime contracting classification; definitions; exemptions

A. The prime contracting classification is comprised of the business of prime contracting and dealership of manufactured buildings. The prime

contracting classification does not include the sale of a used manufactured building.

B. The tax base for the prime contracting classification is sixty-five per cent of the gross proceeds of sales or gross income derived from the business. The following amounts shall be deducted from the gross proceeds of sales or gross income before computing the tax base.

1. The sales price of land, which shall not exceed the fair market value.

2. Sales and installation of groundwater measuring devices required under § 45-604.

3. Furniture, furnishings, fixtures, appliances, and attachments not incorporated as component parts of manufactured buildings at the time of purchase by the dealership for resale. Such items are subject to the taxes imposed by this article separately and distinctly from the gross proceeds or gross income from the sale of the manufactured building.

C. Subcontractors or others who performed services in respect to any improvement, building, highway, road or railroad, excavation or other structure, project, development or improvement are not subject to tax if they can demonstrate that the job was within the control of a prime contractor or contractors or a dealership of manufactured buildings and that the prime contractor or dealership is liable for the tax on the gross income, gross proceeds of sales or gross receipts attributable to the job and from which the subcontractors or others were paid.

D. For purposes of this section:

1. "Contracting" means engaging in business as a contractor.
2. "Contractor" is synonymous with the term "builder" and means a person, firm, partnership, corporation, association or other organization, or a combination of any of them, that undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structure or works in connection therewith, and includes subcontractors and specialty contractors. For all purposes of taxation or deduction, this definition shall govern without regard to whether or not such contractor is acting in fulfillment of a contract.
3. "Dealership of manufactured buildings" means a dealer who is licensed pursuant to title 41, chapter 16, who sells at retail manufactured homes, mobile homes or factory-built buildings, as such terms are defined in § 41-2142, and who supervises, performs or coordinates the excavation and completion of site improvements, setup or moving of a manufactured home or factory-built building including the contracting, if any, with any subcontractor or special contractor for the completion of the contract.
4. "Prime contracting" means engaging in business as a prime contractor.
5. "Prime contractor" means a contractor who supervises, performs or coordinates the construction, alteration, repair, addition, subtraction,

improvement, movement, wreckage or demolition of any building, highway, road, railroad, excavation or other structure, project, development or improvement including the contracting, if any, with any subcontractors or specialty contractors and is responsible for the completion of the contract.

E. Every person engaging or continuing in this state in the business of prime contracting or dealership of manufactured buildings shall present to the purchaser of such prime contracting or manufactured building a written receipt of the gross income or gross proceeds of sales from such activity and shall separately state the taxes to be paid pursuant to this section.

2. *The Buy Indian Act, 25 U.S.C. § 47, as amended through 1994, provides:*

§ 47. Employment of Indian labor and purchase of products of Indian Industry

So far as may be practicable Indian labor shall be employed, and purchases of the products (including, but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market in the discretion of the Secretary of the Interior. Participation in the Mentor-Protege Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991 (10 U.S.C. 2301 note) or receipt of assistance pursuant to any developmental assistance agreement authorized under such program shall not render Indian labor or Indian industry ineligible to receive any assistance authorized under this section. For the purposes of this section -

- (1) no determination of affiliation or control (either direct or indirect) may be found between a

protege firm and its mentor firm on the basis that the mentor firm has agreed to furnish (or has furnished) to its protégé firm pursuant to a mentor-protege agreement any form of developmental assistance described in subsection (f) of section 831 of the National Defense Authorization Act for Fiscal Year 1991 (10 U.S.C. 2301 note):

(2) the terms 'protege firm' and 'mentor firm' have the meaning given such terms in subsection (c) of such section 831.

3. *Section 124(b) of the Surface Transportation Act of 1982, P.L. 97-424, approved January 6, 1983, 96 Stat. 2097, 2114, 23 U.S.C. § 204 provides:*

§ 204 Federal Lands Highways Program [lands highways program]

(a) Recognizing the need for all Federal roads which are public roads to be treated under the same uniform policies as roads which are on the Federal-Aid systems, there is established a coordinated Federal lands highways program which shall consist of the forest highways, public lands highways, park roads, parkways, and Indian reservation roads as defined in section 101 of this title.

(b) Funds available for forest highways and public lands highways shall be used by the Secretary to pay for the cost of construction and improvement thereof. Funds available for park roads, parkways and Indian reservation roads shall be used by the Secretary of the Interior to pay for the cost of construction and improvement thereof. In connection therewith, the Secretary and the Secretary of the Interior, as appropriate, may enter into construction contracts and such other contracts with a State or civil subdivision thereof or Indian tribe as deemed advisable. In the case of Indian reservation

roads, Indian labor may be employed in such construction and improvement under such rules and regulations as may be prescribed by the Secretary of the Interior. No ceiling on Federal employment shall be applicable to construction or improvement of Indian reservation roads.

(c) Before approving as a project on an Indian reservation road any project on a Federal-aid system in a State, the Secretary must determine that the obligation of funds for such project is supplementary to and not in lieu of the obligation, for projects on Indian reservation roads, of a fair and equitable share of funds apportioned to such State under section 104 of this title.

(d) Cooperation of States, counties, or other local subdivisions may be accepted in construction and improvement, and any funds received from a State, county, or local subdivision shall be credited to appropriations available for the class of Federal lands highways to which such funds were contributed.

(e) Construction of each project shall be performed by contract awarded by competitive bidding, unless the Secretary or the Secretary of the Interior shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest. Notwithstanding the foregoing, the provisions of section 23 of the "Buy Indian" Act of June 25, 1910 (36 Stat. 891), and the provisions of section 7(b) of the Indian Self-Determination and Education Assistance Act of 1975 (88 Stat. 2205) shall apply to all funds administered by the Secretary of the Interior which are appropriated for the construction and improvement of Indian reservation roads.

(f) All appropriations for the construction and improvement of each class of Federal lands highways shall be administered in conformity with regulations and agreements jointly approved by the Secretary and the Secretary of the appropriate Federal land managing agency.

APPENDIX F

REGULATIONS INVOLVED

1. *Part 170 - Roads of the Bureau of Indian Affairs - of Title 25 of the Code of Federal Regulations (1996), provides in pertinent part:*

§ 170.3 Construction and improvement.

Subject to the availability of appropriations for Indian reservation roads and bridges and any other contribution of State or Indian tribal lands, the Commissioner shall plan, survey, design and construct roads on the Federal-Aid Indian Road System to provide an adequate system of road facilities serving Indian lands.

§ 170.4 Approval of road construction activities.

The Secretary of Transportation or his authorized representative shall approve the location, type, and design of all projects on the Federal-Aid Indian Road System before any construction expenditures are made. All such construction shall be under the general supervision of the Secretary of Transportation or his authorized representative.

(23 U.S.C. 208)

§ 170.4a Selection of road construction projects.

The Commissioner, who is responsible for the planning, surveys and design, shall keep the appropriate local tribal officials informed of all technical information relating to the project alternatives of proposed road developments. The Commissioner shall recommend to the tribe those proposed road projects having the greatest need as determined by the comprehensive transportation analysis. Tribes shall then establish annual priorities for road construction projects. Subject to the approval of the Commissioner,

the annual selection of road projects for construction shall be performed by tribes. Funds available for the construction of roads on the Federal-Aid Indian Road System shall not be used for the capital improvement to privately-owned property. (39 Stat. 355)

§ 170.5 Right-of-way.

(a) The procedure for obtaining permission to survey and for granting any necessary right-of-way are governed by part 169 of this chapter. Tribal consent as required under § 169.3(a) may be made by public dedication where proper tribal authority exists. Before any work is undertaken for the construction of road projects, the Commissioner shall obtain the written consent of the Indian landowners. Where an Indian has an interest in tribal land by virtue of a land use assignment, such consent shall be obtained from both the landholder of the assignment and the Indian tribe. Right-of-way easements are to be on a form approved by the Commissioner.

(b) If it appears that the road might be transferred to the tribe, the county or the State within 10 years, then before such construction is undertaken, right-of-way easements for the project shall be obtained in favor of the United States, its successors and assigns, with the right to construct, maintain and repair improvements thereon and thereover, for such purposes and with the further right in the United States, its successors and assigns, to transfer the right-of-way easements by assignment, grant or otherwise.

§ 170.5a Employment of Indians.

The Bureau of Indian Affairs road program shall be administered in such a way as to provide training and employment of Indians. The Commissioner may contract with tribes and Indian-owned construction companies, or the Commissioner may purchase materials,

obtain equipment and employ Indian labor in the construction and maintenance of roads.

(36 Stat. 861; 78 Stat. 241, 253; 78 Stat. 257; 25 U.S.C. 47; 42 U.S.C. 2000e(b), 2000e-2(i); 23 U.S.C. 208(c))

§ 170.6 Maintenance of Indian roads.

The administration and maintenance of Indian reservation roads and bridges is basically a function of the local Government. Subject to the availability of funds, the Commissioner shall maintain, or cause to be maintained, those approved roads on the Federal-Aid Indian Road System. The Commissioner may also maintain roads not on the Federal-Aid Indian Road System if such roads meet the definition of "Indian reservation road and bridges" and are approved for maintenance by the Commissioner. No funds authorized under 23 U.S.C. 208 are available for the maintenance of roads.

§ 170.6a Contributions from tribes.

The Commissioner may enter into agreements with an Indian tribe for a contribution from its tribal funds for the construction or maintenance of roads governed by regulations of this part. However, the tribe must be able to make such contributions without undue impairment of the necessary tribal functions.

2. *Part 271-Contracts Under the Indian Self-Determination Act of Title 2 of the Code of Federal Regulations (1996)(superseded by 25 C.F.R. Part 900, effective June 24, 1996, 61 FR 32501), provides in pertinent part:*

§ 271.4 Statement of policy.

(a) The Congress has recognized the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of

educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress has declared its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibilities to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services

(c) It is the policy of the Bureau to facilitate the efforts of Indian tribes to plan, conduct, and administer programs, or portions thereof, which the Bureau is authorized to administer for the benefit of Indians and to facilitate the coordination of all Federal and other programs on Indian reservations.

(d) It is the policy of the Bureau to continually encourage Indian tribes to become increasingly knowledgeable about Bureau programs and the opportunities Indian tribes have regarding them; however, it is the policy of the Bureau to leave to Indian tribes the initiative in making requests for contracts and to regard self-determination as including the decision of an Indian tribe not to request contracts.

(e) It is the policy of the Bureau not to impose sanctions on Indian tribes with regard to contracting or not contracting; however, the special resources made available to facilitate the efforts of those Indian tribes which do wish to contract should be made known to all tribes, as should the current realities of funding and Federal personnel limitations.

(f) Contracting is one of several mechanisms by which Indian tribes can exercise their right to plan, conduct, and administer programs or portions thereof which the Secretary is authorized to administer for the benefit of Indians. Another mechanism afforded Indian tribes is the use of a grant, as provided in part 272 of this chapter, or other resources, to plan the manner in which it wishes the Bureau to operate a program or portion thereof.

(g) Contracting by its very nature places Bureau officials in the dual position of assisting Indian tribes, in many instances, by furnishing technical assistance in preparation of contract proposals, and of carrying out their fiscal and administrative responsibilities as officials of the Federal Government. It is recognized that very often these two positions are in opposition to each other. The Act and these regulations are designed to address this problem to the degree practicable. The Commissioner, Area Directors and Superintendents, as line officers of the Bureau, are expected to balance these two positions within the framework of the regulations in this part.

(h) The regulations in this part are not meant to and do not change the eligibility criteria which individuals must meet to be eligible for any program currently operated by the Bureau. The eligibility criteria for each Bureau program is given in the part of 25 CFR chapter I, which deals with that program. A contractor shall use the existing Bureau eligibility criteria in operating all or parts of a Bureau program under a contract under this part unless a waiver is obtained from the Commissioner. The Commissioner may not waive eligibility criteria established by statute. The Commissioner may waive eligibility criteria established by regulation in 25 CFR chapter I.

§ 271.11 Eligible applicants.

Any tribal organization is eligible to apply for a contract or contracts with the Bureau to plan, conduct, and administer all or parts of Bureau programs under section 102 of the Act. However, before the Bureau can enter into a contract with a tribal organization, it must be requested to do so by the Indian tribe or tribes to be served by the contract in accordance with § 271.18.

§ 271.12 Contractible Bureau programs.

(a) Tribal organizations are entitled to contract with the Bureau to plan, conduct, and administer all or parts of any program which the Bureau is authorized to administer for the benefit of Indians. All or parts of any program include:

(1) Any part of a Bureau program which is divisible from the remainder of the program so long as the contract does not significantly reduce benefits to Indians served by the non-contracted part(s) of the program. However, to the extent that it is within the Bureau's existing authority and the program or part thereof involves only one tribe and one Bureau Agency or Area Office, the benefits provided to Indians by the non-contracted part(s) of the program may be reduced at the request of the tribe. When the program or part thereof serves more than one tribe, the benefits provided by the noncontracted part(s) of the program may be reduced when all of the tribes served consent to a reduction.
